STATE OF MICHIGAN

COURT OF APPEALS

LYON FINANCIAL SERVICES, INC., d/b/a U.S. BANKCORP BUSINESS EQUIPMENT FINANCE GROUP,

Plaintiff-Appellee,

v

EAGLE TRANSPORT SERVICES, INC.,

Defendant,

and

JACK P. BOSS,

Defendant-Appellant.

UNPUBLISHED
March 14, 2006

No. 265387
Ottawa Circuit Court
LC No. 04-050797-CK

Before: Murphy, P.J., and White and Meter, JJ.

PER CURIAM.

Defendant Boss (Boss) appeals as of right the circuit court's order granting summary disposition under MCR 2.116(C)(10) and entering judgment for plaintiff. We affirm.

Defendant Eagle Transport Services (Eagle Transport)[1] leased business equipment from Applied Imaging, which assigned the lease to plaintiff. The lease agreement specified that Eagle Transport would make sixty monthly payments of $646, pay late fees and interest in the event of late monthly payments, and pay any reasonable collection and attorney fees in the event of default. Boss signed a guaranty contract, agreeing to personally guarantee Eagle Transport's obligations under the lease.

After Eagle Transport stopped making regular monthly payments under the lease in early 2004, plaintiff brought suit. Plaintiff moved for summary disposition, and the circuit court

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[1] Boss was the president and owner of Eagle Transport Services.

granted summary disposition for plaintiff on the issue of liability and entered judgment in plaintiff's favor in the amount of $54,881.14.

We review a trial court's decision on a motion for summary disposition de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion made under MCR 2.116(C)(10) tests the factual support of a claim. *Id*. We consider the facts in a light most favorable to the nonmoving party. *Id*.

Boss asserts that the motion was improperly granted because discovery remained open. Under the circumstances here, we disagree.

It is generally inappropriate for a circuit court to grant summary disposition under MCR 2.116(C)(10) before the parties have completed discovery. *Townsend v Chase Manhattan Mortgage Corp*, 254 Mich App 133, 140; 657 NW2d 741 (2002); *Village of Dimondale v Grable*, 240 Mich App 553, 566; 618 NW2d 23 (2000). However, "if a party opposes a motion for summary disposition on the ground that discovery is incomplete, the party must at least assert that a dispute does indeed exist and support that allegation by *some independent evidence*." *Bellows v Delaware McDonald's Corp*, 206 Mich App 555, 561; 522 NW2d 707 (1994) (emphasis added). Summary disposition granted before the close of discovery is not premature if there is "no fair chance that further discovery will allow the party opposing the motion to present sufficient support for its allegations." *CMI Int'l, Inc v Intermet Int'l Corp*, 251 Mich App 125, 135; 649 NW2d 808 (2002).

Boss suggests that additional discovery may have uncovered further evidence regarding "accord and satisfaction," "lack of privity," "improper charges concerning attorney fees," and "late charge impropriety," but he does not support his claims with "independent evidence" as required by *Bellows, supra*. Mere speculation and conjecture is insufficient to survive a motion under (C)(10). *Libralter Plastics, Inc v Chubb Group*, 199 Mich App 482, 486; 502 NW2d 742 (1993). Thus, even though discovery was not complete, Boss' speculations were insufficient to overcome summary disposition. *Bellows, supra* at 561.

Boss next contends that summary disposition was premature because further evidence might have shown a factual dispute regarding whether the guaranty contract was voided by the August 2003 lease addendum. We disagree, because there is no reasonable probability that further evidence would have established such a dispute. *CMI Int'l, supra* at 135.

Where an obligation has been *materially* altered, any guaranty of that obligation is discharged, unless the personal guarantor has consented. *Wilson Leasing Co v Seaway Pharmacal Corp*, 53 Mich App 359, 369; 220 NW2d 83 (1974) (emphasis added). If the alteration causes the obligation to increase, or extends the time for performance, then it is a material alteration. *Id*. The addendum here stated only that Eagle had paid a $646 security deposit, and was signed by Boss. This fact indicates that Boss consented to the alteration. The addendum *decreased* the amount owed by $646. An alteration that does not increase the obligation or extend the time for performance is not material. *Id*. No further discovery could have established that the August 2003 alteration was "material" or that it discharged Boss as personal guarantor.

Boss also contends that summary disposition was premature because further discovery may have shown a factual dispute regarding whether he received consideration for signing the guaranty contract. We disagree. Like all contracts, a guaranty contract must be supported by consideration. *First Nat'l Bank of Ypsilanti v Redford Chevrolet Co*, 270 Mich 116, 121; 258 NW 221 (1935). Consideration is a bargained-for exchange, with "a benefit on one side, or a detriment suffered, or service done on the other. *General Motors Corp v Dep't of Treasury*, 466 Mich 231, 238-239; 644 NW2d 734 (2002).

At the time he signed the guaranty, Boss was president and owner of Eagle Transport. In return for Eagle Transport's promise to pay and Boss' agreement to guarantee the payments, Eagle Transport had use of the leased equipment. That Boss no longer owns Eagle Transport is of no consequence, because he clearly benefited from the lease at the time it was signed. Such a benefit constituted legal consideration. *Id.* No further evidence could have established that the guaranty executed between Boss and plaintiff was not supported by consideration.

Finally, Boss argues that summary disposition was premature because further discovery may have established a factual dispute with respect to whether the guaranty contract had expired. Boss contends that the guaranty contract expired when he terminated his ownership of Eagle Transport, and that his obligation to guarantee the lease ended when he sold the company. We disagree.

Boss agreed to guarantee a series of discrete lease payments rather than a single transaction. "A guaranty that covers transactions arising in the future within the contemplation of the agreement will be considered a continuing guaranty." 18 Michigan Pleading & Practice, § 24, p 41, citing *Furst v Larsen*, 252 Mich 291, 293-295; 233 NW 320 (1930), and *Nat'l Bldg Supply Co v Spencer*, 211 Mich 228, 236-237; 178 NW 655 (1920). The contractual language specifically provided that Boss would personally guarantee all future lease payments of $646, arising on a monthly basis. A continuing guaranty continues during the time period provided for in the contract. *Krekel v Thomasma*, 255 Mich 283, 286; 238 NW 255 (1931); see also 18 Michigan Pleading & Practice, § 24, p 41. Because the contract specified its own duration, it was a continuing guaranty, and Boss was obligated to guarantee the lease payments for sixty months. No further development could have supported Boss' contention that the guaranty had expired.

For the above reasons, we affirm the grant of summary disposition with respect to liability. Nor do we disturb the grant of summary disposition with respect to damages. Plaintiff moved for summary disposition, seeking $55,527.14 in damages ($43,125.13 in principal, $10,781.28 in attorney fees, $1,445.85 in interest, and $174.88 in costs). Plaintiff supported these figures with the affidavit of its collections manager and a detailed calculation of the balance remaining due under the lease. Boss did not submit any evidence disputing plaintiff's figures. The circuit court determined that there was no factual dispute with respect to the amount of damages, and after deducting the security deposit payment of $646 from the total damages sought, entered judgment for plaintiff in the amount of $54,881.14.

Boss asserts that attorney fees are not typically awardable. As a general rule, attorney fees are not recoverable as an element of costs or damages. *Dessart v Burak*, 470 Mich 37, 42; 678 NW2d 615 (2004). However, an exception exists when parties specifically contract for the payment of attorney fees. *Grace v Grace*, 253 Mich App 357, 370-371; 655 NW2d 595 (2002).

When attorney fees are specifically contemplated by the provisions of a contract, they become part of the damages awardable under the contract. See *Central Transport, Inc v Fruehauf Corp*, 139 Mich App 536, 548; 362 NW2d 823 (1984). Here, Boss' guarantee of the lease clearly provided that "[y]ou agree to pay our reasonable attorneys fees and actual court costs." Therefore, attorney fees were properly included among the damages awarded in this case.

Boss also suggests that late fees were improperly awarded. "[T]he damages recoverable for breach of contract are those that arise naturally from the breach or *those that were in the contemplation of the parties at the time the contract was made*." *Kewin v Massachusetts Mutual Life Ins Co*, 409 Mich 401, 414; 295 NW2d 50 (1980) (emphasis added). Here, the plain and unambiguous language of the lease provided that "[i]f any part of a payment is late, you agree to pay a late charge of 15% of the payment which is late . . . ." Therefore, the award of late fees was clearly intended by the parties at the time the lease was made.

Finally, Boss appears to challenge the amount of damages awarded in general, suggesting that the circuit court should have determined whether the amounts were reasonable, but he cites no legal authority. Because Boss has failed to properly brief the merits of this claim, the issue has been abandoned. *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999). In any event, Boss presented no evidence that a genuine issue of fact existed regarding the amount of damages, and never even suggested that damages were in dispute. Summary disposition on the amount of damages was properly granted. *Id*.

Affirmed.

/s/ William B. Murphy
/s/ Helene N. White
/s/ Patrick M. Meter